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No. 14-

Supreme Court, U.S.
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In the Supreme Court of the United States

JORGE LUNA TORRES,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

STUART BANNER
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095

MATTHEW L. GUADAGNO
Counsel of Record
265 Canal Street, Ste. 506
New York, NY 10013
(212) 343-1373
Matthew@Guadagno-Immigration.com

QUESTION PRESENTED

Whether a state offense constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43), on the ground that the state offense is "described in" a specified federal statute, where the federal statute includes an interstate commerce element that the state offense lacks.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Jorge Luna Torres, respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Second Circuit is reported at 764 F.3d 152 (2d Cir. 2014). App. 1a. The opinion of the Board of Immigration Appeals is unreported. App. 15a. The opinion of the Immigration Judge is also unreported. App. 18a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Second Circuit was entered on August 20, 2014. The Court of Appeals denied a timely petition for rehearing en banc on November 7, 2014. App. 24a. On January 16, 2015, Justice Ginsburg extended the time to file a petition for certiorari until March 9, 2015. No. 14A770. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

8 U.S.C. § 1101(a)(43) is reproduced in Appendix E. App. 25a.

STATEMENT

The circuits are split 6-1 on a classic question of statutory interpretation, pitting a literal interpretation of the statute against the view of some judges

that Congress must have meant something other than what it said.

Under the Immigration and Naturalization Act, an alien is ineligible for cancellation of removal if he has committed an "aggravated felony." 8 U.S.C. § 1229b(a)(3). This is just one of the many important immigration consequences that flow from a determination that one has committed an aggravated felony. A person who has committed an aggravated felony can be deported, 8 U.S.C. § 1227(a)(2)(A)(iii), is ineligible for asylum, 8 U.S.C. § 1158(b)(2)(B)(i), is subject to expedited removal proceedings, 8 U.S.C. § 1228(a)(3)(A), faces additional obstacles to reentering the U.S., 8 U.S.C. § 1182(a)(9)(A)(ii), receives a much longer prison sentence for reentering the U.S. without permission, 8 U.S.C. § 1326(b)(2), and can even be sent to a country where his life would be threatened, 8 U.S.C. § 1231(b)(3)(B). A lot turns on whether a particular offense is classified as an "aggravated felony."

The statute provides a very long definition of "aggravated felony," 8 U.S.C. § 1101(a)(43), which includes some crimes identified by their generic names (such as murder and rape, 8 U.S.C. § 1101(a)(43)(A)), and other crimes identified as those "described in" or "defined in" particular sections of the U.S. Code. For example, the statute does not say that arson is an aggravated felony. Rather, the statute defines as an aggravated felony "an offense described in ... section 844(d), (e), (f), (g), (h), or (i) of" Title 18, the provisions that criminalize arson and related explosives offenses. 8 U.S.C. § 1101(a)(43)(E)(i).

The statute also specifies that the term "aggravated felony" "applies to an offense described in this paragraph whether in violation of Federal or State law." 8 U.S.C. § 1101(a)(43) (unnumbered penultimate sentence). In determining whether a state offense is "described in" a particular section of the U.S. Code, courts use the familiar "categorical approach"—they compare the elements of the state offense with the elements of the specified federal offense to see if they are identical. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013); *Lopez v. Gonzales*, 549 U.S. 47, 57 (2006) (explaining that the penultimate sentence of § 1101(a)(43) "confirms that a state offense whose elements include the elements of a felony punishable under [the specified federal statute] is an aggravated felony"). This much is common ground.

The circuit split arises because many federal criminal statutes are not identical to their state analogues. The federal statutes often include an extra element pertaining to interstate commerce. Arson is a perfect example. In New York, arson includes three elements. A person is guilty of arson if he (1) intentionally (2) damages a building or motor vehicle (3) by starting a fire or causing an explosion. N.Y. Penal Law § 150.10(1). But federal arson, in addition to the three elements of state arson, has a fourth element with no counterpart in state arson. The property damaged by fire or explosive must be "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." 18 U.S.C. § 844(i). The elements of the two crimes are not identical. *See Jones v. United States*, 529 U.S. 848, 859 (2000).

The circuits are divided over the consequences of this difference. In the decision below, the Second Circuit joined the Fourth, Fifth, Seventh, Eighth, and Ninth Circuits in deciding that this extra element of federal crimes should be ignored. In the view of these circuits, when Congress defined an aggravated felony as an offense "described in" a federal statute, Congress must have meant "described in, except for the interstate commerce element of the federal offense." The Third Circuit, by contrast, correctly holds that "described in" means "described in." The Third Circuit thus concludes that the very same statute at issue in this case—third degree arson under N.Y. Penal Law § 150.10—is *not* an aggravated felony as defined by the INA, because it does not include an interstate commerce element.

1. The BIA's conflicting interpretations

The Board of Immigration Appeals has wrestled with this question for many years, beginning well before the events that gave rise to this case. When the BIA first interpreted 8 U.S.C. § 1101(a)(43)(E), it read the statute literally, to mean that a state offense is not "described in" a federal statute if the state offense lacks the federal statute's interstate commerce element. *In re Vasquez-Muniz*, 22 I. & N. Dec. 1415 (BIA 2000), involved an alien who had been convicted in California state court of unlawfully possessing a firearm. The government instituted removal proceedings on the theory that the crime was an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(ii), as an offense "described in" 18 U.S.C. § 922(g)(1). The government acknowledged

that section 922(g)(1) includes an interstate commerce element that the state offense lacks, but the government urged the BIA to ignore this "jurisdictional" element on the ground that only the "substantive' elements of crimes should be considered in determining whether a state offense is "described in" a federal statute. *Vasquez-Muniz*, 22 I. & N. Dec. at 1418.

The BIA rejected the government's contention. Although the BIA acknowledged that "there is no dispute" that the requirement of an effect on interstate commerce is a "jurisdictional element," the BIA found that "[c]haracterizing it as such ... does not change the fact that it is an element of the offense." *Id.* at 1420. The BIA consulted dictionaries and other federal statutes for uses of the phrase "described in," and determined that each usage "reflects a more specific meaning than something merely 'similar to' that which is referenced; rather, in each instance, the phrase 'described in' clearly refers to something specifically set forth elsewhere." *Id.* at 1421. It was thus not enough that the state offense was similar to the federal offense for it to be "described in" the federal statute. The two offenses had to have the same elements. *Id.*

The BIA further noted that elsewhere in the U.S. Code, where Congress has referred to crimes "described in" federal statutes, but has wished to exclude from the described crime the element giving rise to federal jurisdiction, it has done so explicitly. *Id.* at 1421-22. For example, 18 U.S.C. §§ 3142(e)(2)(A) and 3142(f)(1)(D) refer to the deten-

tion of persons convicted of a federal offense "or of a State or local offense that would have been an offense described in [specified parts of the U.S. Code] if a circumstance giving rise to Federal jurisdiction had existed." 18 U.S.C. § 5032 likewise refers to "one of the offenses set forth in this paragraph or an offense in violation of a State felony statute that would have been such an offense if a circumstance giving rise to Federal jurisdiction had existed." *Vasquez-Muniz*, 22 I. & N. Dec. at 1422.

The BIA rejected the government's argument that this literal interpretation of the statute would render meaningless the unnumbered penultimate sentence of section 1101(a)(43), which states that the term "aggravated felony" applies to an offense whether in violation of federal or state law. The BIA explained that this sentence clarifies that state offenses are not exempted from the definition of aggravated felony, but the sentence does not mean that every subsection of the statute necessarily includes a state offense. *Id.* at 1423. The BIA accordingly concluded that a state offense is not "described in" a federal criminal statute where the federal statute includes an interstate commerce element that the state offense lacks. *Id.* at 1424.

But the BIA changed its mind thirteen months later. In the interim, the Court of Appeals for the Ninth Circuit had taken the opposite view of the statute in an unrelated case. *See United States v. Castillo-Rivera*, 244 F.3d 1020, 1023-24 (9th Cir. 2001), *cert. denied*, 534 U.S. 931 (2001). In light of the Ninth Circuit's decision, the BIA issued a new

opinion in *Vasquez-Muniz* determining that a state offense may be "described in" a federal statute even if the state offense lacks an interstate commerce element present in the federal statute. *In re Vasquez-Muniz*, 23 I. & N. Dec. 207 (BIA 2002). The BIA, following the Ninth Circuit, now concluded that "it would be very rare for a state to include federal jurisdictional language within its criminal statutes. Consequently, if state crimes must include a federal jurisdictional element in order to be classified as aggravated felonies, then virtually no state crimes would ever be included." *Id.* at 211. Ever since, the BIA has taken the view that a state offense is "described in" a federal statute even if the federal statute includes an interstate commerce element that the state offense lacks.

In *Matter of Bautista*, 25 I. & N. Dec. 616 (BIA 2011), *vacated by Bautista v. Attorney Gen.*, 744 F.3d 54 (3d Cir. 2014), the BIA applied its new interpretation to the New York arson statute that is at issue in the instant case. The BIA held that "the omission of the Federal jurisdictional element in § 844(i) from the State statute is not dispositive. The offense in section 150.10 of the New York Penal Law contains all of the other substantive elements that are contained in § 844(i), so it is an aggravated felony under the Act." *Id.* at 620.

2. The facts of this case

Petitioner George Luna[1] has been a lawful permanent resident of the United States since 1983, when his parents brought him to this country from the Dominican Republic at the age of nine. Ever since, Luna has lived in Brooklyn, New York. He is a carpenter and an electrician, and he is taking classes at City University of New York toward a degree in civil engineering. He owns his own home, not far from his parents, his brother, and his sister. Luna is engaged to be married. His fiancée is a graduate of Columbia University. Luna was her sole source of financial support while she earned a master's degree. They have postponed their wedding plans until they find out whether Luna will be able to stay in the country. He has only one blemish on an otherwise spotless record. In 1999 he pled guilty to one count of attempted arson in the third degree, in violation of N.Y. Penal Law §§ 110 and 150.10. He was sentenced to one day of imprisonment and five years of probation. App. 2a.

In 2006, Luna was returning to Kennedy Airport from a trip to the Dominican Republic when he was charged with inadmissibility as an alien convicted of a crime involving moral turpitude. He applied for cancellation of removal. An Immigration Judge found him ineligible for cancellation of removal un-

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[1] Petitioner's full name is Jorge Luna Torres. In accordance with Spanish-language naming customs, he uses the last name Luna. Because he has spent virtually all of his life in the United States, everyone calls him George, including his parents and siblings.

der 8 U.S.C. § 1229b(a)(3), on the ground that his state conviction of attempted arson was an aggravated felony. App. 18a-23a.

3. Proceedings below

The Board of Immigration Appeals dismissed Luna's appeal. App. 15a-17a. The BIA explained that in *Matter of Bautista* it had already determined that the New York offense of attempted arson in the third degree is an aggravated felony. App. 16a. The BIA noted that "the sole difference between the federal arson offense set forth at 18 U.S.C. § 844(i) and the New York state offense is that the federal offense has an additional element, namely, that the property must be 'used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce.'" App. 16a (quoting 18 U.S.C. § 844(i)). But because this extra federal element was merely a "jurisdictional element," the BIA held, it could be ignored when comparing the federal and state offenses. App. 16a. The BIA concluded that state statutes "need not contain a nexus to interstate commerce in order to proscribe an offense 'described in'" their federal analogues. App. 16a.

Luna sought review in the U.S. Court of Appeals for the Second Circuit. After briefing, but before oral argument in Luna's appeal, the Third Circuit vacated the BIA's *Matter of Bautista* decision. App. 3a; *Bautista v. Attorney Gen.*, 744 F.3d 54 (3d Cir. 2014). The Third Circuit determined that New York's arson statute does not qualify as an aggravated felony because it lacks the interstate commerce element. App. 3a; *Bautista*, 744 F.3d at 58-69. The Second Circuit

accordingly requested the parties to file supplemental briefs discussing the Third Circuit's decision, which they did before argument. App. 3a.

The Second Circuit denied Luna's petition for review. App. 1a-14a. The Second Circuit recognized that the Third Circuit's decision in *Bautista* "conflicts with interpretations by the Fifth, Seventh, Eighth, and Ninth Circuits of 8 U.S.C. § 1101(a)(43)'s 'offense described in' language." App. 3a. But the Second Circuit disagreed with the Third. The Second Circuit concluded that the statute is ambiguous and that the BIA's interpretation is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). App. 7a-12a.

The Second Circuit began by noting that section 1101(a)(43) uses three different methods of identifying the crimes that constitute aggravated felonies. App. 8a. Some crimes, the court observed, are referred to by their generic names, either directly (as with murder and rape, § 1101(a)(43)(A)), or as offenses "relating to" generically named crimes (as in § 1101(a)(43)(S), which refers to offenses "relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness"). App. 8a. Other crimes are referred to as offenses "defined in" a particular federal statute, as in § 1101(a)(43)(B), which refers to "illicit trafficking in a controlled substance (as defined in section 802 of title 21)." App. 8a-9a. And still other crimes are referred to as offenses "described in" a particular federal statute, as in

§ 1101(a)(43)(E), the provision at issue in this case. App. 9a.

The Second Circuit reasoned that "described in" is a broader standard than "defined in," and that an offense "described in" a federal statute "need not reproduce the federal jurisdictional element to have immigration consequences." App. 9a-10a. The court acknowledged that on this point it disagreed with the Third Circuit, which had come to precisely the opposite conclusion—that "defined in" is the broader standard, and that for a state offense to be "described in" a federal statute the state offense must reproduce the federal statute's jurisdictional element. App. 9a (citing *Bautista*, 744 F.3d at 59).

"On the other hand," the Second Circuit continued, "we do not think that this conclusion follows inexorably from the INA's text and structure." App. 10a. The court pointed out that paragraph 43's unnumbered penultimate sentence does not "unequivocally express[] Congress's intent to discount federal jurisdictional elements in determining whether a state offense is 'described in' a federal statute." App. 10a. In response to the government's argument that without such discounting paragraph 43 would capture few, if any, state crimes, the Second Circuit explained that "the penultimate sentence could also be read to make clear that an offense will not be exempted from the definition of an 'aggravated felony' merely because it was a violation of state or foreign, rather than federal, law." App. 11a.

Because the Second Circuit found the statute ambiguous, it accorded *Chevron* deference to the BIA's

interpretation of the statute as set forth in *Matter of Bautista*. App. 12a. This was the very same BIA interpretation that had been rejected as erroneous by the Third Circuit in *Bautista v. Attorney General*.

REASONS FOR GRANTING THE WRIT

This case involves a 6-1 circuit split on the meaning of a key definitional term in a frequently-litigated statute. But much more is at stake. Six circuits have refused to read the statute literally, because in their view the statute would make more sense if it were easier for state offenses to qualify as aggravated felonies. In their view, when Congress used the words "described in," Congress must have meant "similar to what is described in," or "described in, except for the interstate commerce element."

As Justice Holmes explained long ago, however, "[w]e do not inquire what the legislature meant; we ask only what the statute means." Oliver Wendell Holmes, Jr., *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899). Even if it would have been wiser for Congress to include more state arson convictions as aggravated felonies, "the fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do." *United States v. Locke*, 471 U.S. 84, 95 (1985). In recent years the Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249,

253-54 (1992). But some courts are still taking a red pencil to Congress's work.

The Court should grant certiorari, not just to bring uniformity to a key point of immigration law, but to remind the lower courts that they are in the business of interpreting the words enacted by Congress, not divining the purposes of Congress.

I. The circuits are split 6-1 on whether a state offense constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43), on the ground that the state offense is "described in" a specified federal statute, where the federal statute includes an interstate commerce element that the state offense lacks.

In six circuits—the Second, Fourth, Fifth, Seventh, Eighth, and Ninth—a state offense constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43), on the ground that the state offense is "described in" a federal statute, even if the state offense lacks an interstate commerce element that is present in the federal statute. In the Third Circuit, by contrast, a state offense is "described in" a federal statute under § 1101(a)(43) only if the state offense includes all the elements listed in the federal statute, including the interstate commerce element. The Third Circuit has explicitly rejected the view taken by the Fifth, Seventh, Eighth, and Ninth Circuits, while the Second and Fourth Circuits—the most recent circuits to consider the question—have explicitly rejected the view taken by the Third.

A. In the Second, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits, a state offense is "described in" a federal statute even if the federal statute includes an interstate commerce element that the state offense lacks.

The first Court of Appeals to address this question was the Ninth Circuit in *Castillo-Rivera*, the case that persuaded the BIA to change its mind. The Ninth Circuit held that "the commerce element" of 18 U.S.C. § 922(g) "is merely a jurisdictional basis not essential to whether a state crime is an aggravated felony." *Castillo-Rivera*, 244 F.3d at 1023 (internal quotation marks omitted). The Ninth Circuit provided three reasons for this conclusion.

First, the court discerned that Congress "clearly intended state crimes to serve as predicate offenses," but that "[i]nterpreting the jurisdictional element of § 922(g) to be necessary in order for a firearms conviction to constitute an aggravated felony under § 1101(a)(43)(E)(ii) would reduce the number of state firearms offenses that qualify to no more than a negligible number," because "[r]arely, if ever, would a state firearms conviction specify whether a commerce nexus exists." *Castillo-Rivera*, 244 F.3d at 1023.

Second, the Ninth Circuit noted that the penultimate sentence of § 1101(a)(43) "explicitly includes predicate offenses 'in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years.'" *Castillo-Rivera*, 244 F.3d at 1023 n.4. "Needless to say," the

court concluded, "a foreign offense would likely never contain an interstate commerce nexus." *Id.*

Third, the Ninth Circuit observed that the Sentencing Guidelines define "firearms offense" as any offense covered by certain federal statutes "or any similar offense under state or local law." *Id.* at 1024 (internal quotation marks and italics deleted). From this observation, the court deduced that the Guidelines "clearly anticipated that 'similar' state firearms offenses would constitute aggravated felonies under § 1101(a)(43)(E)." *Id.*

For these reasons, the Ninth Circuit concluded that "a state felon in possession offense is not required to include a commerce nexus as one of its elements in order to qualify as an aggravated felony." *Id.*

The Seventh Circuit followed the Ninth, in *Negrete-Rodriguez v. Mukasey*, 518 F.3d 497 (7th Cir. 2008). *Negrete-Rodriguez* likewise raised the question whether the state offense of unlawfully possessing a firearm is "described in" 18 U.S.C. § 922(g), where the state offense lacks § 922(g)'s interstate commerce element. "We find the Ninth Circuit's reasoning persuasive," the Seventh Circuit declared. "The only purpose of the commerce element of § 922(g)(1) is to obtain federal jurisdiction over the crime. Clearly, Congress did not intend an element not necessary in state law to be the factor determining whether the state offense can be considered the equivalent of a § 922(g)(1) offense." *Negrete-Rodriguez*, 518 F.3d at 502. The Seventh Circuit could be confident that such was Congress's intent,

the court explained, because requiring the elements of the state crime to match the elements of the federal crime, including the interstate commerce element, "would likely eliminate the intended inclusion of most state statutes, since states do not operate under the same jurisdictional constraints as the federal government." *Id.*

The Fifth Circuit followed suit in *Nieto Hernandez v. Holder*, 592 F.3d 681 (5th Cir. 2009), another case involving a comparison of the elements of 18 U.S.C. § 922(g) and the elements of a state offense of unlawful possession of a firearm. Like the Ninth and Seventh Circuits, the Fifth Circuit determined that "Congress intended more than a negligible number of state firearm offenses to be encompassed within § 1101(a)(43)(E)(ii)'s definition of 'aggravated felony,'" and that including the interstate commerce element in the comparison would "undermine that intent." *Nieto Hernandez*, 592 F.3d at 685.

The Eighth Circuit held likewise in *Spacek v. Holder*, 688 F.3d 536 (8th Cir. 2012). The Eighth Circuit found that a state racketeering conviction was "described in" 18 U.S.C. § 1962, despite the absence of § 1962's interstate commerce element from the state offense. *Spacek*, 688 F.3d at 538. The court determined that "described in" was a less restrictive construction than "defined in," as used elsewhere in 8 U.S.C. § 1101(a)(43). *Spacek*, 688 F.3d at 538. The Eight Circuit added that "few if any state criminal provisions include a jurisdictional nexus of the sort found in 18 U.S.C. § 1962." *Id.* at 539.

In the decision below, the Second Circuit took this view as well. Unlike the previous four circuits on this side of the split, which found § 1101(a)(43) clear enough that *Chevron* deference was unnecessary, the Second Circuit found the statute ambiguous but then reached the same result by deferring to the BIA under *Chevron*. App. 12a.

The Fourth Circuit joined this side of the split most recently, in *Espinal-Andrades v. Holder*, --- F.3d ---, 2015 WL 268528 (4th Cir. Jan. 22, 2015). The Fourth Circuit explained: "We recognize that the Third Circuit, in a divided opinion, ruled differently on this precise issue. *Bautista*, 744 F.3d at 54. Frankly, we disagree with the majority opinion's analysis and conclusion." *Id.* at *3 n.2.

B. In the Third Circuit, a state offense is "described in" a federal statute only if the state offense includes all the elements listed in the federal statute, including the interstate commerce element.

On the other side of the split stands the Third Circuit. *Bautista v. Attorney Gen.*, 744 F.3d 54 (3d Cir. 2014). Rather than simply assuming that Congress must have intended § 1101(a)(43) to sweep in as many state offenses as possible, the Third Circuit looked carefully at the text of the statute to determine what Congress actually said. *Bautista* involved the identical state statute as in the instant case—attempted arson in the third degree, N.Y. Penal Law §§ 110 and 150.10—so there is a square split between the Second and Third Circuits, and a split un-

der any practical definition of the word between the Third Circuit and the Fourth, Fifth, Seventh, Eighth, and Ninth Circuits. The Second Circuit acknowledged this conflict in the decision below. App. 3a ("The Third Circuit's decision conflicts with interpretations by the Fifth, Seventh, Eighth, and Ninth Circuits of 8 U.S.C. § 1101(a)(43)'s "offense described in" language.").

The Third Circuit began by observing that § 1101(a)(43) refers to crimes in three different ways. It refers to some crimes by their generic names, like "murder" or "theft." *Bautista*, 744 F.3d at 59. It refers to some as offenses "described in" a federal statute. *Id.* And it refers to others as involving conduct "defined in" a federal statute. *Id.* The court recognized that § 1101(a)(43) uses "defined in" when referring to a U.S. Code section that contains a definition. *Id.* In the subsections using "defined in," "the state conviction need not be punishable under that federal statute but need only include the listed criminal conduct, as it is 'defined' by the federal statute." *Id.* The Third Circuit continued: "In contrast, Congress employs 'described in' to classify a state conviction as an aggravated felony when an offense would be punishable under a federal statute because the conduct or state statute of the conviction encompasses the same elements as a federal statute." *Id.*

The Third Circuit agreed with its sister circuits "that the penultimate sentence conveys Congress's intent to qualify more than a negligible number of state convictions as aggravated felonies." *Id.* at 64. But it disagreed with the other circuits' conclusion

that § 1101(a)(43) "evidences Congress's intent to accomplish that objective through the use of 'described in' rather than 'defined in' as a means to always discard jurisdictional elements of federal felonies." *Id.* The Third Circuit pointed out: "If Congress had intended to exclude the jurisdictional element of all federal statutes from the categorical approach analysis, it could simply have included a different penultimate sentence stating that jurisdictional elements should be ignored." *Id.* The court noted that Congress had explicitly made similar exclusions in other parts of § 1101(a)(43), such as the exclusion for offenses below certain monetary thresholds in § 1101(a)(43)(D) and § 1101(a)(43)(M)(i), the exclusion for political offenses in § 1101(a)(43)(F), and the exclusion for first offenses in § 1101(a)(43)(J). *Id.*

The Third Circuit also observed that if Congress had wished to dispense with the jurisdictional element, "Congress also could have defined the offenses embodied in the federal statutes by their generic names rather than by specific statutes," as it did elsewhere in § 1101(a)(43). *Id.* "For instance, in the case of § 844(i), it could have simply left the category open to all explosive materials offenses or at least to all acts of arson. But it did not make such a generic reference: It referred to arson that included a sufficient relationship to interstate commerce." *Id.* The court concluded: "We must assume that Congress was aware of the limits imposed by the Commerce Clause on the reach of the statutes it passes and that it restricted the breadth of § 101(a)(43)(E) [8 U.S.C. § 1101(a)(43)(E)] with the substantive con-

straints of the included jurisdictional elements in mind." *Id.*

For these reasons, the Third Circuit "decline[d] to apply our sister circuits' reasoning." *Id.* at 66. "The bottom line is that § 844(i) does not describe generic arson or common law arson, but arson that involves interstate commerce." *Id.* The Third Circuit scrupulously (and rather artificially) declared that the scope of its decision was restricted to arson, so that strictly speaking its decision did not conflict with those of the Fifth, Seventh, Eighth, and Ninth Circuits, which had considered firearm possession and racketeering, not arson. *Id.* at 62, 66, 67. As a practical matter, however, the decision of the Third Circuit cannot be reconciled with those of the Fifth, Seventh, Eighth, and Ninth Circuits. As the Third Circuit recognized, "[w]hile Bautista's argument has been rejected by several of our sister circuits in regard to offenses described in § 922(g)(1), we find it congruous with the structure of the INA and Supreme Court precedent." *Id.* at 61. In the Third Circuit, a state offense is "described in" a federal statute only if the state offense includes the federal statute's interstate commerce element, but in the other circuits, a state offense is "described in" a federal statute even if the state offense lacks the interstate commerce element. Judge Ambro acknowledged as much in his dissenting opinion in *Bautista*. *Id.* at 73 (Ambro, J., dissenting) (noting that if the Third Circuit were to consider the issue in the context of a firearms offense, the court would be "in the untenable position of either abandoning the logic of the majority's opinion or ruling counter to our sister Circuit Courts").

The Third Circuit concluded: "Congress hand-picked which specific federal criminal statutes it would include" in § 1101(a)(43), "and we must give due weight to such deliberate choices." *Id.* at 68. Congress chose to refer to murder and rape by their generic names, § 1101(a)(43)(A), but it chose to refer to arson by a section of the U.S. Code, § 1101(a)(43)(E)(i). As the Third Circuit noted, "[w]e cannot imagine that Congress took the trouble to incorporate its own statutory scheme ... if it meant [for] courts to ignore it." *Id.* (quoting *Lopez*, 549 U.S. at 58).

The government did not seek rehearing en banc in *Bautista* despite the obvious conflict with the other circuits. This Court is thus the only court that can resolve the conflict.

If George Luna lived just a few miles to the west, across the Hudson River in the Third Circuit, he would be eligible for cancellation of removal, and indeed he would be an extraordinarily strong candidate for it. As long as the Second and Third Circuits are in conflict, lawful permanent residents like Luna are well advised to fly into Newark Airport rather than JFK, and immigration lawyers have every incentive to get their cases before the immigration court in Newark rather than the one in New York. This circuit conflict will have important practical effects until it is resolved.

II. A state offense is "described in" a federal statute only if the state offense includes all the elements of the federal statute, including the interstate commerce element.

The Third Circuit has it right, and the BIA got it right the first time. A state offense is "described in" a federal criminal statute only if the state offense includes all the elements of the federal crime, including the interstate commerce element.

Speakers of ordinary English who are untainted by legal learning would recognize this right away. A concept is "described in" a text only if the text actually depicts that very concept, not some other concept that is similar to it but lacks one of its elements. As the BIA correctly pointed out in its first *Vasquez-Muniz* opinion, dictionaries reflect this understanding of the phrase. *Vasquez-Muniz*, 22 I. & N. Dec. at 1420 (quoting the definitions of "describe" in *Black's Law Dictionary* and *Webster's New International Dictionary*, both of which refute the government's contention that "described in" means "that which is analogous or similar in nature to that which is being compared").

The U.S. Code uses the phrase "described in" in its ordinary English sense. Just to pick one of a great many examples, 18 U.S.C. § 521(a) defines a "criminal street gang" as an organization the members of which engage in "offenses described in subsection (c)." Subsection (c) in turn says: "The offenses described in this section are" certain specified federal crimes. These uses of the phrase "described in" con-

form to ordinary English usage. They refer to specific listed items, not to a vague category of things that resemble a listed item but lack an element of a listed item. There are many other sections of the U.S. Code that use the phrase "described in" in the same way. This issue has now been litigated in seven circuits, and the government has yet to cite a single instance in which the U.S. Code uses the term "described in" to mean "similar to what is described in" or "described in except for one element."

A close analysis of the text of 8 U.S.C. § 1101(a)(43) reinforces this conclusion. If Congress had wished to draft a statute that included ordinary state law arson as an aggravated felony, there would have been several easy ways to do it, all of which Congress used elsewhere, some in this very statute.

First, 8 U.S.C. § 1101(a)(43)(E) could simply have used the generic term "arson," rather than "an offense described in" one of several federal statutes. This was the method Congress used for murder, rape, and sexual abuse of a minor, § 1101(a)(43)(A), and for theft and burglary, § 1101(a)(43)(G).

Second, § 1101(a)(43)(E) could have said "a Federal offense described in" one of the specified federal statutes "or a State offense that would have been such an offense if a circumstance giving rise to Federal jurisdiction had existed." This was the method Congress used in 18 U.S.C. § 3142(e)(2)(A), which requires pretrial detention where a "person has been convicted of a Federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in

subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed." *See also* 18 U.S.C. § 3142(f)(1)(D) (using the same method); 18 U.S.C. § 5032 (providing that a juvenile shall be tried as an adult if he "has previously been found guilty of an act which if committed by an adult would have been one of the offenses set forth in this paragraph or an offense in violation of a State felony statute that would have been such an offense if a circumstance giving rise to Federal jurisdiction had existed").

Third, instead of stating "an offense *described in*" one of the specified federal statutes, § 1101(a)(43)(E) could have said "an offense *relating to*" the crimes described in those statutes. Congress used this method for offenses "relating to" failure to appear for sentencing, § 1101(a)(43)(Q), offenses "relating to" commercial bribery, counterfeiting, and forgery, § 1101(a)(43)(R), and offenses "relating to" obstruction of justice and perjury, § 1101(a)(43)(S).

Fourth, instead of stating "an offense *described in*" one of the specified federal statutes, § 1101(a)(43)(E) could have said "an offense *substantially similar to*" the crimes described in those statutes. Congress used this method in 21 U.S.C. § 802(32)(A), which defines as unlawful narcotics substances with chemical compositions "substantially similar to" those of certain specified controlled substances.

Fifth, the penultimate sentence of § 1101(a)(43) could simply have said that state offenses count as

aggravated felonies regardless of whether jurisdictional elements are present.

Congress chose each of these alternatives elsewhere, including elsewhere in this very statute, but not in 8 U.S.C. § 1101(a)(43)(E). The obvious inference is that ordinary state law arson is not an aggravated felony.

Moreover, as the Third Circuit correctly pointed out in *Bautista*, 744 F.3d at 68, some of the federal criminal statutes referenced in § 1101(a)(43) have jurisdictional elements other than use in interstate commerce. Calling them "jurisdictional" does not diminish their status as elements; they are as important as any other elements of their respective offenses. For instance, § 1101(a)(43)(E) defines as an aggravated felony "an offense described in" 18 U.S.C. § 844(g), which forbids the possession of an explosive "in an airport that is subject to the regulatory authority of the Federal Aviation Administration." The existence of FAA regulatory authority is an element of the crime to ensure federal jurisdiction, just like the use of property in interstate commerce is a jurisdictional element of federal arson under 18 U.S.C. § 844(i). If a person possessed an explosive in an airport that is *not* subject to FAA regulatory authority, he would surely not be committing "an offense described in" 18 U.S.C. § 844(g), precisely because of the absence of the jurisdictional element.

Or to pick another example, § 1101(a)(43)(H) defines as an aggravated felony "an offense described in" 18 U.S.C. § 876, which forbids the sending of threatening communications "by the Postal Service."

The Postal Service element is in the statute to ensure federal jurisdiction, just like the use of property in interstate commerce is a jurisdictional element of federal arson. If a person sent a threatening communication by semaphore, or by carrier pigeon, or by any medium other than the Postal Service, he would surely not be committing an offense "described in" 18 U.S.C. § 876, again because of the absence of the jurisdictional element. The outcome should be the same for the jurisdictional element of federal arson. An element is an element, regardless of the reason it was inserted in the statute. A court cannot choose to ignore an element of a crime to suit the court's view of sound policy, simply because the element is jurisdictional.

Some of the circuits that have interpreted the statute incorrectly have labored under the misimpression that a literal interpretation of "described in" would render the penultimate sentence of 8 U.S.C. § 1101(a)(43) a near-nullity, because few if any state crimes require a connection to interstate commerce. *Castillo-Rivera*, 244 F.3d at 1023; *Negrete-Rodriguez*, 518 F.3d at 502; *Nieto Hernandez*, 592 F.3d at 685; *Spacek*, 688 F.3d at 538-39. But this view is clearly mistaken. The penultimate sentence merely says that state offenses can qualify as aggravated felonies. It does not say that every single subpart of § 1101(a)(43) must include both federal and state offenses. Under a literal interpretation of "described in," many state offenses—all that are identified by their generic names—would still qualify as aggravated felonies, including murder, rape, and sexual abuse of a minor, § 1101(a)(43)(A); theft and

burglary, § 1101(a)(43)(G); offenses relating to prostitution, § 1101(a)(43)(K)(i); offenses involving fraud and deceit, § 1101(a)(43)(M)(i); forgery and counterfeiting, § 1101(a)(43)(R); and obstruction of justice and perjury, § 1101(a)(43)(S). The penultimate sentence "provides that a generic description" of an offense, "not specifically couched as a state offense or a federal one, covers either one." *Lopez*, 549 U.S. at 57. The penultimate sentence is thus far from a nullity—indeed, it still covers a great number of state offenses—when "described in" is taken to mean "described in."

Some of the circuits that have misinterpreted the statute have drawn an erroneous conclusion from the fact that some subsections of 8 U.S.C. § 1101(a)(43) use the term "defined in," while others use the term "described in." These courts have mistakenly reasoned that "described in" must mean something less precise than "defined in." *See Castillo-Rivera*, 244 F.3d at 1023; *Spacek*, 688 F.3d at 538; App. 9a-10a; *Espinal-Andrades*, 2015 WL 268528 at *3. A close look at the statute, however, reveals a much more plausible reason for the coexistence of the two phrases, one that the Third Circuit correctly elucidated. *See Bautista*, 744 F.3d at 59. Section 1101(a)(43) uses "defined in" only when referring to a federal statute that explicitly provides a *definition* of a term. *See* 8 U.S.C. § 1101(a)(43)(B) (referring to the definition of "drug trafficking crime" in 18 U.S.C. § 924(c)); 8 U.S.C. § 1101(a)(43)(C) (referring to the definitions of "firearm" and "destructive device" in 18 U.S.C. § 921 and to the definition of "explosive materials" in 18 U.S.C. § 841(c)); 8

U.S.C. § 1101(a)(43)(F) (referring to the definition of "crime of violence" in 18 U.S.C. § 16). By contrast, section 1101(a)(43) uses "described in" when referring to a federal statute that *describes* a crime by stating its elements. *See, e.g.*, 8 U.S.C. § 1101(a)(43)(D) (referring to 18 U.S.C. § 1956, which states the elements of money laundering); 8 U.S.C. § 1101(a)(43)(H) (referring to, *inter alia*, 18 U.S.C. § 875, which states the elements of extortion); 8 U.S.C. § 1101(a)(43)(I) (referring to, *inter alia*, 18 U.S.C. § 2251, which states the elements of sexual exploitation of children).

In the court below, the government argued that a literal interpretation of 8 U.S.C. § 1101(a)(43)(E) would render meaningless the clause of 8 U.S.C. § 1231(a)(4)(B)(ii) that authorizes the Attorney General to remove an alien serving a state prison sentence "for a nonviolent offense (other than an offense described in section 1101(a)(43)(C) or (E) of this title)." This clause assumes that *some* state offenses must be listed in § 1101(a)(43)(E), but the government errs twice in contending that arson must be one of them. First, § 1231(a)(4)(B)(ii) by its own terms applies only to "a nonviolent offense," but arson is a violent offense. *See, e.g.*, 18 U.S.C. § 924(e)(2)(B)(ii); 18 U.S.C. § 3156(a)(4). Second, § 1101(a)(43)(E) lists many federal criminal statutes, several of which do not contain interstate commerce elements. These include 18 U.S.C. § 922(o) (prohibiting the possession and transfer of machine guns), 18 U.S.C. § 922(p) (prohibiting the possession and transfer of firearms not detectable by metal detectors); 18 U.S.C. § 922(r) (prohibiting the assembly of

certain firearms identical to prohibited firearms); 18 U.S.C. § 924(h) (prohibiting the transfer of firearms to be used in crimes of violence or drug trafficking); and 26 U.S.C. § 5861 (prohibiting a wide range of firearms-related conduct, most of which has no interstate commerce element). These (or at least the nonviolent ones among them) are the offenses referred to in the clause of 8 U.S.C. § 1231(a)(4)(B)(ii) on which the government relies. This clause is thus hardly meaningless when "described in" is taken to mean "described in."[2]

For these reasons, 8 U.S.C. § 1101(a)(43)(E) is not ambiguous, so there is no occasion to accord *Chevron* deference to the BIA. But if there was, the rationale for deferring to the BIA would be at its weakest. When the BIA initially interpreted the statute, in its first opinion in *Vasquez-Muniz*, it determined that a state offense is *not* "described in" a federal statute if the federal statute includes an interstate commerce element that the state offense lacks. *In re Vasquez-Muniz*, 22 I. & N. Dec. 1415 (BIA 2000). The BIA flip-flopped thirteen months later, not because it had developed any new expertise on the topic, but because the Ninth Circuit had reached the opposite result in a poorly reasoned opinion in an unrelated case. *In re Vasquez-Muniz*, 23 I. & N. Dec. 207 (BIA 2002). The BIA was, in effect, deferring to the Ninth

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[2] This case is thus easily distinguishable from *Nijhawan v. Holder*, 557 U.S. 29, 39 (2009), in which the Court rejected an interpretation of 8 U.S.C. § 1101(a)(43) that would have left one of its provisions "with little, if any, meaningful application." Under the Third Circuit's correct interpretation of the statute, no provision is consigned to meaninglessness.

Circuit when it changed its view. It makes sense to defer to an agency when the agency is making its own decision in its area of specialization, but it does not make sense to defer to an agency when the agency is merely following what a court has decided, especially when the agency's considered view was exactly the opposite prior to the court decision.

The only real argument in support of the decision below is a nagging sense that Congress could not really have meant what it said in the text of the statute, because the statute, as written, classifies few if any state arson convictions as aggravated felonies. There are three responses to this intuition.

First, it would not have been absurd for Congress to exclude ordinary state arson from the definition of aggravated felony. Many of the acts that constitute ordinary state arson are exceedingly minor. In New York, for example, a person whose cigarette leaves a burn mark on the wall of a residence has committed the felony of third degree arson. A person who merely *tries* to leave a burn mark, but fails, has committed the felony of attempted third degree arson. *See* N.Y. Penal Law §§ 110, 150.10. Congress could reasonably have determined that such minor offenses do not merit expulsion from the country.

Second, we have no way of knowing whether the 535 members of Congress actually intended something different from what they wrote. All we have is the text of the statute. Most likely, no member of Congress gave any thought at all to the number of state arson convictions that would be deemed aggravated felonies for immigration purposes. The penul-

timate sentence of § 1101(a)(43) was added by the Immigration Act of 1990, 104 Stat. 4978, 5048, at a time when the definition of aggravated felony was much simpler and did not include any provisions referring to arson. Section 1101(a)(43)(E) was enacted as part of the Immigration and Nationality Technical Corrections Act of 1994, 108 Stat. 4305, 4320-22. It was not the highest priority on Congress's agenda.

The third and most fundamental response is that a court's nagging sense of what Congress must have meant is utterly irrelevant. If the statute sweeps in fewer arson convictions than a judge thinks is appropriate, it is not the judge's business to rewrite the statute. Every year, Congress enacts statutes that some find anomalous. "But this Court does not revise legislation ... just because the text as written creates an apparent anomaly." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2033 (2014). It may well be that Congress—if anyone had given the matter more thought—would have wanted to include more state arson convictions as aggravated felonies than Congress actually did include. "The question, however, is not what Congress 'would have wanted' but what Congress enacted." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992). What Congress enacted was a statute that excludes most state arson convictions from the definition of aggravated felony. If Congress wants more state arson convictions to be included, then Congress should amend the statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STUART BANNER
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095

MATTHEW L. GUADAGNO
Counsel of Record
265 Canal St., Ste. 506
New York, NY 10013
(212) 343-1373
Matthew@Guadagno-Immigration.com

APPENDIX A

United States Court of Appeals, Second Circuit

JORGE LUNA TORRES, Petitioner,
v.
ERIC H. HOLDER, JR., Attorney General of the United States, Respondent.*

Docket No. 13–2498

Argued: May 5, 2014
Decided: Aug. 20, 2014

Before: SACK, RAGGI, and CHIN, Circuit Judges.

SACK, Circuit Judge:

We consider on this appeal whether a conviction under New York Penal Law §§ 110 and 150.10 for attempted arson in the third degree constitutes an "aggravated felony" under the Immigration and Nationality Act ("INA"). *See* 8 U.S.C. § 1101(a)(43)(E)(i). Answering this question requires us to decide whether this state crime, which lacks a federal jurisdictional element, is an "offense described in" 18 U.S.C. § 844(i), the federal statute governing explosive materials offenses, which does contain such an element. Because we defer to the BIA's reasonable determination that a state "offense described in" 18

* The Clerk of the Court is respectfully directed to amend the caption as set forth above.

U.S.C. § 844(i) need not contain a federal jurisdictional element, we deny the petition.

BACKGROUND

Jorge Luna Torres, a native and citizen of the Dominican Republic and a lawful permanent resident of the United States, was convicted in 1999 of attempted arson in the third degree in violation of New York Penal Law §§ 110 and 150.10. Luna[1] was sentenced to one day of imprisonment and five years of probation.

In 2006, Luna sought admission to the United States as a lawful permanent resident after a trip abroad. On March 13, 2007, the Immigration and Naturalization Service issued a Notice to Appear charging Luna with inadmissibility as an alien convicted of a crime involving moral turpitude.

Luna applied for cancellation of removal. After a merits hearing, a United States Immigration Judge ("IJ") found Luna removable as charged, a conclusion which Luna does not challenge before this Court. Relying on *Matter of Bautista*, 25 I. & N. Dec. 616 (BIA 2011), *overruled by Bautista v. Attorney Gen.*, 744 F.3d 54 (3d Cir. 2014), the IJ also found Luna ineligible for cancellation of removal as a permanent resident convicted of an aggravated felony, *see* 8 U.S.C. § 1229b(a)(3). In *Matter of Bautista*, the Board of Immigration Appeals ("BIA") had concluded that a conviction under the same provision of the New York Penal Law constitutes an aggravated felony under

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[1] Although the removal proceedings employ the petitioner's full name, Jorge Luna Torres, he refers to himself as Jorge Luna. We follow his preference here.

section 101(a)(43)(E)(i) of the INA as an "offense described in" 18 U.S.C. § 844(i). *Matter of Bautista*, 25 I. & N. Dec. at 618–20; see 8 U.S.C. § 1101(a)(43)(E)(i) (codifying INA § 101(a)(43)(E)(i)).

Luna appealed the denial of cancellation to the BIA. He argued that the agency should reconsider *Matter of Bautista* and that, if it did not, the decision should not be applied retroactively to his case. The BIA dismissed Luna's appeal, declining to reconsider *Matter of Bautista* and concluding that its effect was not impermissibly retroactive. Luna timely petitioned this Court for review, repeating both of these arguments.

After briefing but before oral argument in Luna's appeal, the Third Circuit vacated the BIA's ruling in *Matter of Bautista*, concluding that the New York arson statute did not qualify as an aggravated felony because it lacked the federal jurisdictional element. *Bautista v. Attorney Gen.*, 744 F.3d 54, 56 (3d Cir. 2014). The Third Circuit's decision conflicts with interpretations by the Fifth, Seventh, Eighth, and Ninth Circuits of 8 U.S.C. § 1101(a)(43)'s "offense described in" language. *See Spacek v. Holder*, 688 F.3d 536 (8th Cir. 2012) (interpreting 8 U.S.C. § 1101(a)(43)(J), relating to racketeering offenses); *Nieto Hernandez v. Holder*, 592 F.3d 681 (5th Cir. 2009) (interpreting 8 U.S.C. § 1101(a)(43)(E)(ii), relating to firearms offenses); *Negrete-Rodriguez v. Mukasey*, 518 F.3d 497 (7th Cir. 2008) (same); *United States v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir. 2001) (same). We therefore requested supplemental briefing, which the parties submitted prior to oral argument.

DISCUSSION

I. Jurisdiction and Standard of Review

This Court lacks jurisdiction to review the BIA's denial of discretionary relief from removal. *See* 8 U.S.C. §§ 1252(a)(2)(B)(ii), 1229b(a). But Luna's claim that his conviction is not an aggravated felony rendering him statutorily ineligible for cancellation of removal raises a question of law which we retain jurisdiction to review, *id.* § 1252(a)(2)(D), and which we evaluate under the principles of deference set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

II. Whether a Violation of New York Penal Law § 150.10 Constitutes an Aggravated Felony Under the INA

On appeal, Luna argues that *Matter of Bautista* was incorrectly decided because Congress intended to define as "aggravated felonies" only those state law crimes encompassing all elements of the federal statute, including so-called "jurisdictional" elements. Because we defer to the BIA's reasonable conclusion to the contrary, we reject this argument.

The Statutory Framework

Under the INA, an alien is ineligible for cancellation of removal if he has been convicted of an aggravated felony. 8 U.S.C. § 1229b(a)(3). The statute defines the term "aggravated felony" by enumerating an extensive catalogue of crimes identified with varying degrees of specificity. *See id.* § 1101(a)(43). The definition's penultimate sentence also provides that

"[t]he term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years." *Id.*

Among the offenses included under INA § 101(a)(43)'s definition is "an offense described in" 18 U.S.C. § 844(i). *See* 8 U.S.C. § 1101(a)(43)(E)(i). That section in turn provides:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both....

18 U.S.C. § 844(i). New York Penal Law § 150.10, under which Luna was convicted, provides that "[a] person is guilty of arson in the third degree when he intentionally damages a building or motor vehicle by starting a fire or causing an explosion." N.Y. Penal Law § 150.10(1). The two statutes are substantially similar except that 18 U.S.C. § 844(i) contains one element—that the property destroyed be "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce"—which New York Penal Law § 150.10 lacks. The question this appeal poses is whether the New York provision must include this jurisdictional element in order to qualify as an "offense described in" the federal statute.

The BIA's Decision in Matter of Bautista

The BIA confronted precisely this question in *Matter of Bautista*. After determining that New York Penal Law § 150.10 and 18 U.S.C. § 844(i) are substantially similar except for the jurisdictional element, the BIA concluded that its analysis in *Matter of Vasquez-Muniz*, 23 I. & N. Dec. 207 (BIA 2002) (en banc), controlled. *Matter of Bautista*, 25 I. & N. Dec. at 618–20.

In *Matter of Vasquez-Muniz*, the BIA decided that a conviction under the California Penal Code for possession of a firearm by a felon constituted an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(ii) as an "offense described in" 18 U.S.C. § 922(g)(1). *Matter of Vasquez-Muniz*, 23 I. & N. Dec. at 213. The BIA, sitting *en banc*, reasoned that a state crime "described in" a federal crime need not reproduce the federal jurisdictional element. *Id.* The BIA concluded that the penultimate sentence of section 1101(a)(43), which clarifies that the term "aggravated felony" applies to "an offense described in this paragraph whether in violation of Federal or State law" or "the law of a foreign country," expressed a congressional "concern over *substantive* offenses rather than any concern about the jurisdiction in which they are prosecuted." *Id.* at 210 (emphasis added). The BIA also reasoned that, since states rarely include federal jurisdictional language in their criminal statutes, requiring state crimes to reproduce federal jurisdictional elements in order to constitute aggravated felonies would virtually excise state criminal convictions from the ambit of section 1101(a)(43)(E), despite clear language to the contrary. *Id.* at 211 (cit-

ing 8 U.S.C. § 1231(a)(4)(B)(ii), which refers to aliens "in the custody of a State" pursuant to a final conviction for an offense described in 8 U.S.C. § 1101(a)(43)(E)). The same would be true, the BIA concluded, of foreign offenses. *Id.* at 211–12.

Applying this reasoning in *Matter of Bautista*, the BIA found no distinction between the federal jurisdictional element of 18 U.S.C. §§ 844(i) and that of 922(g)(1). *Matter of Bautista*, 25 I. & N. Dec. at 620. The BIA also distinguished the holding of *Jones v. United States*, 529 U.S. 848, 120 S.Ct. 1904, 146 L.Ed.2d 902 (2000), which emphasized the importance of section 844(i)'s federal jurisdictional element, as "related to the scope of the Federal criminal statute, not the collateral consequences in an immigration case." *Matter of Bautista*, 25 I. & N. Dec. at 621. The BIA therefore concluded that a conviction under New York Penal Law §§ 110 and 150.10 constituted an aggravated felony rendering an alien ineligible for cancellation of removal. *Id.* at 622.

***Our Analysis Under* Chevron**

Chevron requires us to defer to an agency's reasonable interpretation of the statute it administers. *Chevron*, 467 U.S. at 842–44, 104 S.Ct. 2778; *Kar Onn Lee v. Holder*, 701 F.3d 931, 936 (2d Cir. 2012). We must first ask "whether Congress has directly spoken to the precise question at issue[,] ... for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43, 104 S.Ct. 2778. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether

the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S.Ct. 2778. We must defer to the BIA's interpretation of the INA unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844, 104 S.Ct. 2778.

"The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Kar Onn Lee*, 701 F.3d at 936 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997)) (internal quotation marks omitted). "In interpreting the statute at issue, we consider not only the bare meaning of the critical word or phrase but also its placement and purpose in the statutory scheme." *Id.* (quoting *Holloway v. United States*, 526 U.S. 1, 6, 119 S.Ct. 966, 143 L.Ed.2d 1 (1999)) (internal quotation marks omitted). Considering the language of clause 1101(a)(43)(E)(i) and its place in paragraph 1101(a)(43) and the INA as whole, we conclude that the statute is ambiguous as to whether a state crime must contain a federal jurisdictional element in order to constitute an aggravated felony.

Section 1101(a)'s paragraph 43 identifies crimes that constitute aggravated felonies in three ways. Some are indicated in terms of generic offenses or offenses "relating to" generic offenses. *See, e.g.*, 8 U.S.C. § 1101(a)(43)(A) ("murder, rape, or sexual abuse of a minor"); *id.* § 1101(a)(43)(S) ("an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness"). Others are referred to as offenses "defined in" a particular federal statute. *See, e.g., id.* § 1101(a)(43)(B)("illicit traf-

ficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)"). And still others are denominated offenses "described in" a particular federal statute. *See, e.g., id.* § 1101(a)(43)(E). The provision at issue here belongs in this last category.

Luna contends that, for a state offense to be one that is "described in" a federal statute, the elements of the state and federal crimes, including any jurisdictional elements, must be identical. *See* Pet'r's Br. at 13–17. The Third Circuit took a similar approach in rejecting the BIA's decision in *Matter of Bautista*, concluding that state offenses "described in" a federal statute must reproduce the federal jurisdictional element to constitute aggravated felonies, while offenses "defined in" a federal statute need not.[2] *Bautista*, 744 F.3d at 59.

We are inclined to disagree. It seems to us, as it did to the Fifth, Seventh, Eighth, and Ninth Circuits, that "described in" is the broader standard, and that an offense identified in this way need not reproduce the federal jurisdictional element to have

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[2] The Third Circuit also reasoned that if Congress had intended all state arson crimes to constitute aggravated felonies, it could have written section 1101(a)(43)(E)(i) to refer to the generic offense of arson rather than the federal statute governing explosives offenses. *Bautista*, 744 F.3d at 64. While this argument is not without force, we find at least equally persuasive the counterargument that Congress may have chosen to indicate the covered crimes by referring to 18 U.S.C. § 844 because the explosives offenses detailed therein are broader than generic or common-law arson. *Cf. Negrete-Rodriguez*, 518 F.3d at 503 ("[M]any firearms offenses are not susceptible to being easily described in general terms....").

immigration consequences. *See Castillo–Rivera*, 244 F.3d at 1023 (stating that Congress "'had to use some looser standard such as "described in" rather than the more precise standard of "defined in," if it wanted more than a negligible number of state offenses to count as aggravated felonies'"); *Negrete–Rodriguez*, 518 F.3d at 502, 503 (discussing *Castillo–Rivera*'s distinction between "described in" and "defined in" and rejecting petitioner's argument that "'defined in' and 'described in' are synonymous"); *Nieto Hernandez*, 592 F.3d at 685–86 (citing *Negrete–Rodriguez* and *Castillo–Rivera*); *Spacek*, 688 F.3d at 538 ("Section 1101(a)(43)(J) requires only 'an offense *described in* section 1962 of title 18,' while Congress used the more restrictive construction 'as *defined in*' elsewhere in the statute." (emphases in original)); *see also Bautista*, 744 F.3d at 71 (Ambro, J., dissenting) ("To me, the phrase 'described in' refers broadly to the *type* of offense." (emphasis in original)).

On the other hand, we do not think that this conclusion follows inexorably from the INA's text and structure. We are not fully convinced, for example, that paragraph 43's penultimate sentence unequivocally expresses Congress's intent to discount federal jurisdictional elements when determining whether a state offense is "described in" a federal statute. The BIA has reasoned and the government has argued that the penultimate sentence—which states that the term "aggravated felony" "applies to an offense described in this paragraph whether in violation of" federal, state, or foreign law—requires this interpretation, because otherwise section 1101(a)(43)(E) would capture few, if any, state crimes. *See Matter of*

Bautista, 25 I. & N. Dec. at 619–20; Resp't's Br. at 21–24. We think, though, that the penultimate sentence could also be read to make clear that an offense will not be exempted from the definition of an "aggravated felony" merely because it was a violation of state or foreign, rather than federal, law. This reading would not require the result that the government and the BIA appear to have reached. We therefore are not persuaded that the penultimate sentence evinces an unambiguously expressed congressional intent.

The BIA also determined in *Matter of Bautista*, and the government argues on appeal, that reading 8 U.S.C. § 1101(a)(43) to require state offenses to include a federal jurisdictional element renders meaningless another provision of the Immigration and Naturalization Act. *See Matter of Bautista*, 25 I. & N. Dec. at 620 (citing *Matter of Vasquez-Muniz*, 23 I. & N. Dec. at 212); Resp't's Br. at 25. That provision refers to the removal of aliens who are held "in the custody of a State ... pursuant to a final conviction for ... an offense described in" 8 U.S.C. § 1101(a)(43)(E), among other provisions. 8 U.S.C. § 1231(a)(4)(B)(ii). We agree with the BIA and the government that this provision suggests that at least some state offenses must constitute aggravated felonies under subparagraph (E), or there could be no individuals held in state custody pursuant to crimes "described" there. But this fact alone does not compel the conclusion that Congress has spoken unequivocally regarding whether a state offense "described in" 18 U.S.C. § 844(i) must reproduce that statute's jurisdictional element.

Because we conclude that the statute is ambiguous, we owe deference to the BIA's interpretation unless it is unreasonable. *See Chevron*, 467 U.S. at 842–43, 104 S.Ct. 2778; *Rotimi v. Holder*, 577 F.3d 133, 139 (2d Cir.2009). As already indicated, we find persuasive the BIA's reading of the relevant statutory provisions as set forth in *Matter of Bautista* and might well adopt it ourselves,[3] were we not constrained to do so in any event by *Chevron*. It is noteworthy, too, that the BIA's interpretation is consonant with the conclusions of the Fifth, Seventh, Eighth, and Ninth Circuits concerning related provisions of paragraph 43. We therefore defer to the BIA's "permissible construction" of section 1101(a)(43)(E)(i).[4] *See Kar Onn Lee*, 701 F.3d at 937.

III. Whether Applying *Matter of Bautista* Is Impermissibly Retroactive

In the alternative, Luna argues that *Matter of Bautista* cannot be applied retroactively to him because the decision represented "such a departure from past practices by the [BIA]" that he lacked no-

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[3] Even if we were to decide that the BIA's reading of the statute is clearly preferable to the Petitioner's, it would not follow that the provision is unambiguous and that Chevron deference is therefore not required. Equipoise is not a precondition to a finding of ambiguity.

[4] For this reason, we reject Luna's argument that the rule of lenity should be applied to his case. *See Adams v. Holder*, 692 F.3d 91, 107 (2d Cir. 2012) (stating that lenity enters only "when none of the other canons of statutory interpretation is capable of resolving the statute's meaning and the BIA has not offered a reasonable interpretation of the statute" (internal quotation marks omitted)).

tice that the state arson crime to which he pled guilty would be deemed an aggravated felony. Pet'r's Br. 30. We see no obstacle to *Matter of Bautista*'s application in Luna's case.

Luna's 1999 conviction postdated the 1996 enactment of 8 U.S.C. § 1101(a)(43). *See Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 126–27 (2d Cir. 2005). In relying on *Matter of Bautista*, the BIA therefore "did not retroactively apply a new law but instead applied [its] determination of what the law 'had *always* meant.'" *De Quan Yu v. U.S. Attorney Gen.*, 568 F.3d 1328, 1333 (11th Cir. 2009) (per curiam) (emphasis in original) (quoting *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313, n. 12, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994)). Once *Matter of Bautista* issued, "that decision became the controlling interpretation of the law and was entitled to full retroactive effect in all cases still open on direct review, regardless of whether the events predated the ... decision." *Id.* at 1334; *see also Rivers*, 511 U.S. at 312, 114 S.Ct. 1510 ("The essence of judicial decisionmaking—applying general rules to particular situations—necessarily involves some peril to individual expectations because it is often difficult to predict the precise application of a general rule until it has been distilled in the crucible of litigation."). *Matter of Bautista* therefore governs Luna's case.

CONCLUSION

For the foregoing reasons, we defer to the BIA's determination, which we conclude is reasonable, that a conviction under New York Penal Law §§ 110 and 150.10 constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(i), rendering an alien ineligi-

ble for cancellation of removal. Luna's petition is therefore DENIED.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

File: A038 495 579 – New York, NY
Date: Jun 4 2013
In re: JORGE LUNA TORRES a.k.a. George Luna
IN REMOVAL PROCEEDINGS
APPEAL
ON BEHALF OF RESPONDENT: Matthew L. Guadagno, Esquire
CHARGE:
Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] -Crime involving moral turpitude
APPLICATION: Cancellation of removal

The respondent appeals the Immigration Judge's June 12, 2012 decision denying his application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge found the respondent removable, as his conviction for 3rd degree attempted arson in violation of sections 110 and 150.10 of the New York Penal Law is for a crime involving moral turpitude (I.J. at 3-4). Moreover, the Immigration

Judge found the respondent ineligible for relief, as the Board has held that this offense constitutes an aggravated felony. *See Matter of Bautista*, 25 I&N Dec. 616 (BIA 2011) (holding that attempted arson in the third degree in violation of sections 110 and 150.10 of the New York Penal Law is an aggravated felony under section 101(a)(43)(E)(i) of the Act, 8 U.S.C. § 1101(a)(43)(E)(i)) (following *Matter of Vasquez-Muniz*, 23 I&N Dec. 207 (BIA 2002)).

On appeal the respondent argues that the Board should reconsider its decisions in *Matter of Baustista, supra* and *Matter of Vasquez-Muniz, supra* (Respondent's Br. at 5-12). The Board held in *Matter of Bautista, supra*, that attempted arson in the third degree in violation of sections 110 and 150.10 of the New York Penal Law is an aggravated felony under section 101(a)(43)(E)(i) of the Act, even though the state crime lacks the jurisdictional element in the applicable federal arson offense. *Matter of Bautista, supra*, at 620-21. We noted that the sole difference between the federal arson offense set forth at 18 U.S.C. § 844(i) and the New York state offense is that the federal offense has an additional element, namely, that the property must be "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." *Id.* at 620 (citing 18 U.S.C. § 844(i)). We concluded that as this requirement is a "jurisdictional element," our analysis in *Matter of Vasquez-Muniz, supra*, controls. *Id.*

In *Matter of Vasquez-Muniz, supra*, this Board held that state and foreign statutes need not contain a nexus to interstate commerce in order to proscribe an offense "described in" 18 U.S.C. § 922(g)(1). *Matter of Vasquez-Muniz, supra*, at 213. We specifically

held that the alien's offense, possession of a firearm by a felon in violation of section 12021(a)(1) of the California Penal Code, was "described in" section 101(a)(43)(E)(ii) of the Act, and was an aggravated felony, regardless of whether it contained the federal jurisdictional element of affecting interstate commerce contained in 18 U.S.C. § 922(g)(1). *Id.*

The respondent disagrees with our decisions in *Matter of Bautista, supra*, and *Matter of Vasquez-Muniz, supra*, but we are bound to apply these decisions. Moreover, the respondent's appellate arguments do not persuade us that these precedents were wrongly decided (Respondent's Br. at 5-12). Lastly, the respondent contends that *Matter of Bautista, supra*, would have an impermissibly retroactive effect if applied to his conviction, which resulted from a plea agreement entered into before the Board rendered its decision (Respondent's Br. at 12-15). We disagree. The relevant date to consider is the effective date of the aggravated felony provision, not the date of the Board decision. Even assuming our interpretation of what constitutes an aggravated felony could be characterized as a "rule" with potential retroactive effect, there is no presumption against retroactivity and the mere fact that the new rule inured to the detriment of some affected parties cannot be deemed fatal to its validity. *See NLRB v. Bell Aerospace*, 416 U.S. 267 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
NEW YORK, NEW YORK

File: A038-495-579
June 12, 2012

In the Matter of
JORGE LUNA TORRES
RESPONDENT

IN REMOVAL PROCEEDINGS

CHARGES: INA Section 212(a)(2)(A)(i)(I), crime involving moral turpitude.
APPLICATIONS: INA section 240A(a), cancellation of removal for lawful permanent residents.

ON BEHALF OF RESPONDENT: CHRISTOPHER CASSAR
ON BEHALF OF DHS: DANIELLE DUSSEK

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 38-year-old male native and citizen of the Dominican Republic. He became a lawful permanent resident on August 29, 1983 when he was 9 years old. On September 5, 2006, the respondent attempted to enter the United States at John F. Kennedy International Airport as a returning lawful permanent resident. After the Department's records

revealed that the respondent had been convicted of attempted arson in the third degree under New York Penal Law Sections 110 and 150.10, he was issued a Notice to Appear placing him in removal proceedings as an arriving alien. See Exhibit 1. That NTA was filed in the Immigration Court on March 16, 2007. The filing of that document vested the Court with jurisdiction. See 8 C.F.R. Section 1003.14(a).

At a master calendar hearing on March 29, 2007, the respondent appeared with counsel and denied both the factual allegations in the Notice to Appeal and the sole charge of removability. A prior Immigration Judge sustained the charge of removability after finding that the respondent had been convicted of a crime involving moral turpitude and that the factual allegations in the Notice to Appear were true. The Dominican Republic was designated as the country of removal. The issue before the Court is the respondent's application for cancellation of removal for lawful permanent residents under Section 240A(a) of the Immigration and Nationality Act.

REMOVABILITY

Generally, any alien present in the United States who has not been admitted or who arrives at the United States is deemed, for purposes of the Act, to be an applicant for admission. See INA Section 235(a)(1); 8 C.F.R. Section 1240.8(b). However, a lawful permanent resident is not generally treated as an applicant for admission. Although lawful permanent residents are not generally treated as applicants for admission or arriving aliens, there is an exception for aliens described in INA Section 101(a)(13)(C), including those who have committed

an offense identified in INA Section 212(a)(2). See INA Section 101(a)(13)(C)(v). Such individuals are properly regarded as seeking admission to the United States.[1] See Matter of Collado-Munoz, 21 I&N Dec. 1061 (BIA 1997, 1998) (en banc). The Government retains the burden to show by clear and convincing evidence that a lawful permanent resident is an applicant for admission under the statutory criteria. See Matter of Rivens, 25 I&N Dec. 623 (BIA 2011).

In this case, the Department has met its burden by producing a disposition showing that the respondent was convicted of a crime involving moral turpitude under INA 212(a)(2)(A)(i)(I). On June 30, 1999, the respondent pleaded guilty to attempted arson in the third degree in violation of New York Penal Law Sections 110 and 150.10. See Exhibit 3. Under Section 150.10 of the New York Penal Law, a "person is guilty of arson in the third degree when he intentionally damages a building or motor vehicle by starting a fire or causing an explosion." The BIA has defined moral turpitude generally to encompass "conduct that shocks the public conscience as being inherently base, vile or depraved and contrary to the accepted rules of morality and the duties owed between persons or to society in general." See Mendez v. Mukasey, 547 F.3d 345, 347 (2d Cir. 2008). Whether a crime is one involving moral turpitude depends on the offender's evil intent or corruption of

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[1] The Supreme Court's decision in Vartelas v. Holder is not application here because the conviction described in the NTA occurred after the enactment of the IIRIRA. See 132 S. Ct. 1479 (2012).

the mind. Matter of Serna, 20 I&N Dec. 579, 581 (BIA 1992). Because a conviction under Section 150.10 requires an intent to damage property, this Court finds that it is a crime involving moral turpitude under INA Section 212(a)(2)(A)(i)(I). See Matter of Bautista, 25 I&N Dec. 616, 618 (BIA 2011). This conclusion establishes both that the respondent was properly charged as an arriving alien and that he was removable as charged in the NTA.

RELIEF FROM REMOVAL

As relief from removal, respondent seeks cancellation of removal for certain permanent residents under INA Section 240A(a). That relief is available to an alien who: a) has been lawfully admitted for permanent residence for not less than five years; b) has resided in the United States continuously for seven years after having been admitted in any status; and c) has not been convicted of an aggravated felony.

Respondent is ineligible for cancellation of removal because he was convicted on an aggravated felony. See Matter of Bautista, 25 I&N Dec. at 618. The BIA's decision in Bautista is dispositive in this case. In Bautista, the BIA held that attempted arson in the third degree in violation of Sections 110 and 150.10 of the New York Penal Law is an aggravated felony under Section 101(a)(43)(E)(i) of the Immigration and Nationality Act. Accordingly, the BIA affirmed the IJ's decision that the respondent was not eligible for cancellation of removal under INA Section 240A(a). This binding precedent governs this case.

Because the respondent is statutorily ineligible for cancellation of removal, the Court will deny his ap-

plication. Respondent has not sought any other form of relief in this case. The Court has independently considered eligibility for other forms of relief and finds that he is not eligible for a waiver under INA Section 212(h) because of his aggravated felony conviction. Similarly, he is not eligible for voluntary departure. The respondent has indicated that he may marry a U.S. citizen in the near future. Even if he does he would require a 212(h) waiver or other waiver in order to adjust his status. As stated earlier, the respondent is not eligible to adjust his status under INA Section 212(h). Further, the respondent's counsel indicated that he may seek a 440 motion in New York State Court. A 440 motion is a collateral attack on an underlying conviction. The respondent's counsel indicated that he may seek that 440 motion on the basis of the Supreme Court's decision in Padilla. However, on April 20, 2011 during a hearing before the undersigned Judge, counsel for the respondent indicated that he already filed a 440 motion in New York State Court and that motion was denied. The Court declines to grant a further continuance for another 440 motion when a first 440 motion was already denied in State Court.

For all the foregoing reasons, the following orders will be entered:

ORDERS

ORDER: The respondent application for cancellation of removal under INA Section 240A(a) is denied.

FURTHER ORDER: The respondent is ordered removed to the Dominican Republic on the charge set forth in the Notice to Appear.

JESSE B. CHRISTENSEN
U.S. Immigration Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 7th day of November, two thousand fourteen.

Jorge Luna Torres, Petitioner
v.
Eric H. Holder, Jr., Attorney General of the United States, Respondent.

ORDER

Docket No: 13-2498

Petitioner Jorge Luna Torres filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

APPENDIX E

8 U.S.C. § 1101(a)(43):

The term "aggravated felony" means--

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in--

(i) section 842(h) or (i) of Title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of Title 18 (relating to firearms offenses); or

(iii) section 5861 of Title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year;

(H) an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography);

(J) an offense described in section 1962 of Title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that--

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of Title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in--

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of Title 18;

(ii) section 3121 of Title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 3121 of Title 50 (relating to protecting the identity of undercover agents);

(M) an offense that--

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport

or instrument in violation of section 1543 of Title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprison-

ment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.